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ABDUL AZIZ LELA

v.

PP

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COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: N-05-36-07]

C

19 JANUARY 2010

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Deceased assaulted and burned to death - Circumstantial evidence - Proof by way of DNA profiling of specimen - Poor handling of exhibits and specimen*

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by investigating team - Uncertainty as to who packed and marked exhibits - Whether integrity of specimen and exhibits fatally compromised - Whether there was a break in the chain of evidence - Whether no prima facie case made out against appellant

E

EVIDENCE: *Circumstantial evidence - Murder - Chain of evidence - DNA profiling of blood samples and cigarette butts - Swabs of specimen not properly collected and preserved - No evidence adduced as to who packed, restored and sent butts to chemist - Whether there was a break in the chain of evidence - Whether integrity of specimen and exhibits*

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fatally compromised - Whether no prima facie case made out against appellant

This was an appeal against the decision of the High Court convicting the appellant for murder under s. 302 of the Penal Code when the charred remains of his wife was found at a bonfire

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in his orchard. At the trial below, it was the prosecution's case that, motivated by a desire to remarry, the appellant had assaulted the deceased as she was alighting from her Proton Waja at the couple's house, and, having thereafter transported the body in a van to the site of the bonfire, burned her there. It was evident

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that the learned trial judge, in so affirming the appellant's complicity in the murder, was essentially relying on the following circumstantial evidence, namely: (i) the blood stains of the deceased as found in the van and the Proton Waja; (ii) two cigarette butts that were found near the bonfire which the DNA

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profiling confirmed as that of the appellant; and (iii) SMS messages

that were sent from the deceased's SIM card, where the card was later found in the appellant's Mercedes Benz. Be that as it may, in this appeal, the appellant argued that the finding of guilt was fatally flawed as there was a complete break in the chain of evidence. It was contended that swabs of the specimen as collected by the investigators were not properly handled or preserved, and that the manner in which the other exhibits were collected, handled or restored were so shoddy that it raised considerable doubts as to the integrity of the exhibits. Before the learned appeal judges, one critical question that begged the court's determination was whether the allegedly poor handling of the exhibits by the investigators, or the prosecution at the trial as the case may be, had so seriously impaired the prosecution's case that no *prima facie* case of murder could on the facts and in the circumstances be said to have been made out against the appellant.

Held (allowing appeal; setting aside conviction and sentence) Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) The strength of the prosecution's case principally lies on the DNA evidence. However, whilst it is well and good to successfully procure samples and pieces of evidence on the scene, they could also be the cause of the appellant's acquittal if the investigating officers handling the exhibits were to do a shoddy job when packing, marking, marking or ensuring their integrity. For that matter, even poor handling of the exhibits by the learned Deputy Public Prosecutor when tendering the exhibits in the course of hearing could also undo any good investigation. (paras 10-11)

(2) Much of the evidence pertaining to the taking of swabs came from SP13 and the Investigating Officer SP23. SP13 testified to having taken blood samples from several locations surrounding the van, but never clarified what happened to the samples. SP23 took samples of blood from a spanner found at the garage marked as C1, but there was no evidence as to who marked it and what happened to it, hence creating much doubt about the spanner. SP23 also took three swabs from the Proton Waja and five from the van. But that was all that he said about them, thereby repeating the mistake of SP13 by not clarifying what happened to the swabs. (para 12)

(3) There was no evidence that the swab from the spanner collected by SP23 did not contaminate the other swabs and vice versa. SP23 had thus seriously erred when he said nothing about: (i) how they were taken (ii) the stringent measures taken while lifting the traces of blood in order to ensure their purity (iii) whether they were preserved after the collection to prevent contamination and ensure their integrity; (iv) whether they were individually packed so that the swabs did not mix about, or contaminate other swabs (v) distinctly identifying the preserved swabs (vi) stating who packed the exhibits before they were sent to the chemist; and (vii) clarifying the chain of possession. This "break in the chain of evidence" had not been bridged by the prosecution, making the results of the relevant analysis doubtful. (paras 14-15)

(4) SP23 also said he found two cigarette butts at the bonfire, the very pieces of evidence supposed to pin the appellant to that place. However, like the error committed earlier, the immediate measures or subsequent actions undertaken surrounding the butts stopped there. Worse, if only two cigarette butts were recovered from the bonfire, why did the chemist receive three? To compound matters, exhs. P11E and P11F established that two more cigarette butts were recovered at the garage and the office, which brings the total to four cigarette butts recovered by the police. Why the fourth cigarette was not sent to the chemist for DNA analysis also remained unanswered. With such a scenario of uncertainty prevailing, the two impugned cigarette butts could have been the two picked up at the garage and the office. (para 16)

(5) The break in the chain of evidence and exhibits, which compromised the prosecution's case, could be summarized as follows: there was no evidence to establish who marked or packed all the exhibits sent to the chemist and where they were kept before reaching the latter. Even the correct number of exhibits recovered was in doubt. The chemist testified that he received 40 items, whilst SP11 who took the exhibits from the Chemist Department received 42 'sampul berseal'. And yet, the Investigating Officer said he received 53 items from the Chemist Department. This is certainly a confused state of affairs. (para 17)

(6) The issue of the SIM card was riddled with unanswered questions, such as why the necessity for the murderer to meticulously retrieve the SIM card but leaving behind the mobile phone, or whether anyone else could have driven the Mercedes Benz prior to appellant the taking the car from his driver (Md Zulkifli), or why was it that it took the police six days to find the SIM card when it was quite easy to locate. One of the pieces in the jigsaw puzzle could easily be answered if Md Zulkifli had been called as a witness. This unfortunately did not take place as he was only offered to the appellant thereby leaving a gap in the prosecution's evidence. To exacerbate matters, SP19 admitted that the Mercedes Benz was actually his, and the appellant was merely permitted to use it. In any case, between 3.25pm and 4.08pm on 28 March 2003, *ie*, the respective times SP22 received SMS messages from the deceased's mobile phone, without any evidence adduced to indicate that only the appellant would have access to the vehicle, the following people could have access to it, namely Md Zulkifli, SP19 and even the children of the appellant, SP21 and SP22. More, this piece of evidence could be viewed in more than one way, and therefore must slant in favour of the appellant. (paras 18 & 19)

(7) With the evidence of the cigarette butts being inadmissible, and the issue of the SMS messages unhelpful, it was obvious that the prosecution was without any solid evidence except for innuendos and suspicion. Likewise, unless there was cogent and admissible evidence being adduced by the prosecution, this panel is not prepared to accept that merely on the existence of a marriage turned sour, or of the appellant wanting to marry again or had indeed behaved rather callously towards the disappearance of the deceased, a *prima facie* case had been established by the prosecution. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi mensabitkan perayu atas kesalahan bunuh di bawah s. 302 Kanun Keseksaan apabila mayat isterinya yang rentung ditemui berdekatan satu unggun api dalam sebuah dusun milik beliau. Di perbicaraan di bawah, kes pendakwaan adalah bahawa, atas motif untuk berkahwin lain, perayu telah menyerang mangsa sebaik mangsa

turun dari kereta Proton Wajanya di pekarangan rumah mereka, dan, setelah mengangkut mangsa dalam sebuah van ke tempat unggun api, telah membakarnya di situ. Fakta seterusnya menunjukkan bahawa yang arif hakim bicara, dalam mengesahkan pembabitan perayu dalam pembunuhan, secara pentingnya bergantung kepada keterangan-keterangan ikut keadaan berikut, iaitu: (i) kotoran darah si mati yang dijumpai di dalam van dan Proton Waja; (ii) dua puntung rokok yang dijumpai berdekatan unggun api di mana pemprofilan DNA mengesahkan datangnya dari perayu; dan (iii) mesej-mesej SMS yang dihantar dari kad SIM si mati, di mana kad tersebut kemudian dijumpai di dalam kereta Mercedes Benz perayu. Apapun, dalam rayuan di sini, perayu berhujah bahawa dapatan kebersalahan yang dibuat oleh hakim bicara adalah cacat secara yang memudaratkan, oleh kerana seluruh rantaian keterangan adalah berlompang. Dihujahkan bahawa swab specimen sepertimana yang diambil oleh penyiasat-penyiasat telah tidak diambil atau dijaga dengan baik, dan bahawa cara bagaimana eksibit-eksibit lain diambil, ditangani dan dijaga adalah sebegitu teruk sehingga membangkitkan berbagai kesangsian mengenai kesahihan eksibit-eksibit. Di hadapan yang arif hakim-hakim rayuan, satu persoalan penting yang berbangkit untuk pemutusan adalah sama ada cara mengendali eksibit yang dikatakan kurang baik oleh para penyiasat, atau oleh pendakwaan semasa perbicaraan, telah menjejaskan kes pendakwaan dengan sebegitu rupa sehinggakan dalam halkeadaan yang wujud tiada kes *prima facie* bunuh boleh dianggap sebagai telah dibuktikan terhadap perayu.

Diputuskan (membenarkan rayuan; mengenepikan sabitan dan hukuman)

Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Kekuatan kes pendakwaan secara prinsipnya bergantung kepada keterangan DNA. Bagaimanapun, sementara ianya bagus dan baik untuk berjaya mendapatkan contoh-contoh dan cebisan-cebisan keterangan di tempat kejadian, ia boleh juga menjadi penyebab kepada pembebasan perayu jika pegawai-pegawai penyiasat yang mengendalikan eksibit-eksibit tersebut membuat kerja-kerja yang selekeh apabila membungkus, menanda atau menanda dan menentukan kesahihan eksibit-

eksibit itu. Begitu juga, suatu penyiasatan yang baik boleh terjejas oleh pengendalian eksibit yang kurang baik oleh Timbalan Pendakwa Raya sendiri dalam mengemukakan eksibit-eksibit semasa perjalanan perbicaraan. A

(2) Sebahagian besar keterangan mengenai pengambilan contoh darah datangnya dari SP13 dan Pengawai Penyiasat SP23. SP13 mengatakan telah mengambil contoh-contoh darah dari beberapa lokasi di sekitar van, tetapi tidak menjelaskan apa yang berlaku pada contoh-contoh tersebut. SP23 mengambil contoh-contoh darah dari spanner di garaj yang ditanda C1, namun tiada keterangan mengenai siapa yang menandakannya dan apa yang berlaku padanya, sekaligus membangkitkan banyak keraguan mengenai spanner. SP23 juga mengambil tiga contoh darah dari Proton Waja dan lima dari van. Namun, SP23 tidak menyatakan apa-apa lagi mengenainya dan tidak menjelaskan apa yang berlaku kepada contoh-contoh tersebut sekaligus mengulangi kesilapan yang dilakukan SP13. B C D

(3) Tiada keterangan bahawa contoh darah dari spanner tidak mencemar contoh-contoh darah lain atau sebaliknya. SP23 dengan itu jelas melakukan kesilapan apabila gagal menerangkan: (i) bagaimana contoh-contoh tersebut diambil; (ii) langkah-langkah ketat yang diambil apabila mengangkat kesan-kesan darah bagi mempastikan kesuciannya; (iii) sama ada contoh-contoh dipelihara selepas pengambilan bagi menghalang pencemaran dan mempastikan integritinya; (iv) sama ada contoh-contoh dibungkus secara berasingan bagi menghalang campur-aduk, atau pencemaran contoh-contoh lain; (v) mengenalpasti secara tepat contoh-contoh yang dipelihara; (vi) mengenalpasti siapa yang membungkus eksibit-eksibit sebelum dihantar kepada ahli kimia; dan (vii) menjelaskan rantaian milikan. "Kelompangan pada rantaian keterangan" ini tidak dipertautkan oleh pendakwaan, sekaligus menjadikan keputusan-keputusan analisa yang relevan diragui. E F G

(4) SP23 juga menyatakan beliau menemui dua puntung rokok pada unggun api, keterangan mana sepatutnya sudah mampu meletakkan perayu di tempat tersebut. Bagaimanapun, sepertimana dengan kesilapan sebelumnya, langkah-langkah segera dan berikutnya yang diambil mengenai puntung-puntung rokok ini tidak dijelaskan. Lebih malang, jika hanya dua H I

punting rokok dijumpai, mengapa pula ahli kimia menerima tiga puntung? Lebih dari itu, eks. P11E dan P11F menunjukkan bahawa dua lagi puntung rokok ditemui di garaj dan pejabat, yang bererti jumlah puntung rokok yang ditemui polis adalah empat. Kenapa puntung yang keempat tidak dihantar kepada ahli kimia untuk analisa DNA masih tidak terjawab. Dengan senario ketakpastian yang sedemikian, dua puntung rokok yang dicabar mungkin adalah dua puntung rokok yang ditemui di garaj dan pejabat.

(5) Kelompangan pada rantaian keterangan dan eksibit, yang mengkrompromi kes pendakwaan, boleh dirumuskan seperti berikut: tidak terdapat sebarang keterangan mengenai siapa yang menanda atau membungkus kesemua eksibit yang dihantar kepada ahli kimia dan di mana eksibit-eksibit tersebut disimpan sebelum diserahkan kepada pihak terkemudian. Malah terdapat keraguan pada jumlah sebenar eksibit yang ditemui. Ahli kimia menyatakan bahawa beliau menerima 40 item, sementara SP11 yang mengambil eksibit dari Jabatan Kimia menyatakan beliau menerima 42 'sampul berseal'. Manakala Pegawai Penyiasat pula menyatakan beliau menerima 53 item dari Jabatan Kimia. Ini jelas suatu keadaan yang berkecamuk.

(6) Isu mengenai kad SIM penuh dengan persoalan tidak berjawab, seperti apa perlunya si pembunuh dengan begitu teliti mengeluarkan kad SIM tetapi tidak mengambil telefon bimbit, atau sama ada ada orang lain memandu kereta Mercedes Benz sebelum perayu mengambilnya dari pemandu beliau (Md Zulkefli), atau mengapakah polis mengambil masa enam hari untuk menemui kad SIM sedangkan ia boleh ditemui dengan mudahnya. Salah satu dari teka teki ini boleh dijawab dengan senangnya sekiranya Md Zulkifli di panggil sebagai saksi. Ini bagaimanapun tidak berlaku kerana beliau hanya ditawarkan kepada perayu sekaligus meninggalkan suatu lompang pada kes pendakwaan; dan (vi) oleh kerana kad dijumpai enam hari selepas kenderaan dirampas, mungkinkah ada orang lain selain dari perayu yang meletakkan kad di atas dashboard dalam tempoh tersebut? Mengeruhkan lagi keadaan, SP19 mengakui bahawa Mercedez Benz adalah milik beliau, dan perayu hanya dibenarkan untuk menggunakannya sahaja. Apapun, di antara jam 3.25 petang dan 4.08 petang 28 Mac 2008, iaitu masa-masa di mana SP22 menerima SMS dari

telefon bimbit si mati, tanpa sebarang keterangan yang menunjukkan bahawa hanya perayu sahaja yang mempunyai akses kepada kenderaan, maka orang-orang berikut mungkin mempunyai akses kepadanya, iaitu Md Zulkifli, SP19 dan malah anak-anak perayu sendiri, SP21 dan SP22. Selain itu, memandangkan lebih dari satu rumusan boleh dibuat dari keterangan ini, maka seharusnyalah ia dirumus untuk manfaat perayu.

(7) Dengan keterangan mengenai puntung rokok tidak boleh diterima-masuk, dan isu SMS tidak mampu membantu, maka adalah jelas bahawa pendakwaan sudah tidak mempunyai apa-apa keterangan kukuh selain dari innuendo dan sangkaan. Begitu juga, melainkan jika keterangan-keterangan kukuh dikemukakan oleh pendakwaan, panel ini tidak bersedia untuk menerima bahawa cuma berdasarkan kepada perkahwinan yang bermasalah, atau keinginan perayu untuk berkahwin lain atau telah menunjukkan kebersahajaan terhadap kehilangan si mati, maka suatu kes *prima facie* telah dibuktikan oleh pendakwaan.

Case(s) referred to:
Abdullah Zawawi Yusof v. PP [1993] 4 CLJ 1 SC ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Chang Kim Siong v. PP [1967] 1 LNS 18 FC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Hussin Sillit v. PP [1988] 2 CLJ 9; [1988] 1 CLJ (Rep) 128 SC ***(refd)***
McGreevy v. Director of Public Prosecutor [1973] 1 WLR 276 ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
PP v. Richard Chia Kok Hiong [2007] 3 MLJ 129 ***(refd)***
PP v. Syed Muhamad Faysal Syed Ibrahim [2004] 1 LNS 159 HC ***(refd)***
Sia Soon Suan v. PP [1965] 1 LNS 165 FC ***(refd)***
Transport Ministry v. Garry [1973] 1 NZLR 120 ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Penal Code, ss. 300(a), (c), 302

Other source(s) referred to:
Dr Kasinathan Nadesan, *Forensic Medicine and Science,* p 261
Jyotirmoy Adhikary, *DNA Technology in Administration of Justice,* p 39

For the appellant - Hisyam Teh Poh Teik (Hanif Hassan with him); M/s Hanif Hassan & Co
For the respondent - Awg Armadajaya Awg Mahmud; DPP

[Appeal from High Court Shah Alam; Criminal Trial No: 45-11-2003]

Reported by Wan Sharif Wan Ahmad

A

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The appellant was found guilty, convicted, and sentenced to death under s. 302 of the Penal Code for killing his wife, one Zarina binti Mohd Akhir. The charge reads as follows:

> Bahawa kamu antara jam 12.00 tengah malam 27/3/2003 hingga jam 6.20 petang 28/3/2003, di hadapan rumah nombor 10-C, Kampung Tanjung Jati, Kuala Pilah, di dalam Daerah Kuala Pilah di dalam negeri, Negeri Sembilan, telah membunuh dengan menyebabkan kematian terhadap Zarina binti Mohd Akhir, KPT: 650610-05-5450. Oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] The brief facts of the case are as follows:

Zarina bt. Mohd Akhir, the deceased, was married to the appellant. She stayed at Kampong Kayu Jati, Kuala Pilah together with her three children *viz*. Eddie Azrul Hafiza (SP22), Eddie Nurul Azwan (SP21), Eddie Nazrul Hizam (SP20) and the appellant. On 27 March 2003 at about 8pm the deceased with SP18, her friend, left the house with her Proton Waja. At about midnight after sending SP18 home the deceased left for her house. The next day ie, 28 March 2003 SP21 at about 9am realized that the deceased was not at home. When looking for her, SP21 found traces of blood outside the front door of the driver's side of the Proton Waja, parked at the garage. He noticed blood on the surrounding cement floor and on the grass in front of the garage. He informed SP22 of their mother being missing, and the latter subsequently filed a missing person report with the police. The investigating officer, SP23, proceeded to the house and there found a spanner which had traces of blood on it. At the police station in the afternoon, SP22 said he just received two SMS messages, which came from the deceased's hand phone. The message showed time of receipt to be 3.25pm and 4.08pm on that date ie, 28 March 2003.

B C D E F G H I

[3] At 9pm also on 28 March 2003, SP23 went to the appellant's orchard at Kg. Dioh after being informed by SP22 that there were signs of a recent bonfire there (hereinafter referring to the site as 'bonfire'). No investigation was carried out that night as it was dark and was raining heavily. The next day on 29 March 2003, the investigating officer went again to the orchard and carried out certain investigations and observations. He found a chicken coop that had some of the dislodged planks near that bonfire. Nearby he found two cigarette butts (P28A and P29A) and a crowbar. At that bonfire, he found a badly burnt remains of a human being, a gold chain (P6), a watch (P82) and components of a burnt out mobile phone (P78). SP1, a pathologist, testified that the human remains were that of a woman aged about 40 years but was unable to confirm the cause of death. A forensic expert, after comparing a set of mock dentures of the deceased with that of her photograph (P20), found them to fit her. SP10, a chemist, testified that a specimen bone taken from the burnt remains (P65A) showed that they were the remains of the biological mother of SP20, SP21, and SP22.

[4] The Proton Waja of the deceased, a Mercedes Benz carrying registration number NAP 8000 (P87), a van registered as NAF 298 (P89), and another lorry carrying registration number NAJ 8555 (P88) were seized and investigated upon. From the van (P89), four swabs of bloodstains marked as D, D1, D2 and D3 (P45A, P46A, P47A and P48A respectively), strands of hair from the bonnet, marked as D4 and D5 (P49A and P50A) were taken. From the Proton Waja four swabs of blood marked B, B1 and B2 (respectively P32A, P33A and P34A) were lifted. SP10 testified that blood samples from the Proton Waja, the garage floor and the spanner, and from the bonnet of the van were blood of the deceased. This witness too testified that through DNA profiling the DNA on the two cigarette butts (P28A and P29A) were that of the appellant.

[5] Since the prosecution did not have any witness who witnessed the act of the killing, or the person who committed it, the prosecution's case depended on circumstantial evidence. In brief, the prosecution attempted to establish that the charred remains found near the chicken coop were that of the deceased by DNA profiling. SP20, SP21, and SP22 confirmed that the gold bracelet, watch, and remains of the hand phone found at the

bonfire were that of the deceased's. Further, the traces of blood found near the Proton Waja, the garage and the spanner, and hair samples from the van, through the testimony of the expert were established as that of the deceased. As the two cigarette butts found at the bonfire contained the DNA of the appellant, the prosecution's stance was that he must have been at that bonfire at the relevant time when the deceased was burnt. The picture painted by the prosecution was that, with the desire of wanting to remarry being the motive, the appellant must have assaulted the deceased initially when she was alighting from the Proton Waja. There was no evidence adduced by the prosecution whether she died in the course of that assault. Section 302 of the Penal Code reads that whoever commits murder shall be punished with death. Under s. 300 culpable homicide is murder:

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[6] The burning of the deceased, whether already dead at the material time after intentionally assaulting her to death, or still alive but unconscious when burned, the eventual result was still death; the killer would fall squarely under any of the above sub-paragraphs. We see no necessity in discussing the issue further due to its clarity.

[7] The prosecution then ventilated further that the van (NAF 298) was used to transport the body to the site of the bonfire at the orchard and there burned. As said above the DNA in the cigarette butts picked up from the site established his presence at

the time when the bonfire was lit. The fact that an SMS was sent from the deceased's SIM card carrying number 019-2550354, with the card later found in the appellant's Mercedes Benz merely confirmed his complicity.

[8] The learned judge, as clarified in his grounds of judgment, stated that he found no doubts in the prosecution's case that death was caused by the appellant, with subparagraphs (a) and (c) of s. 300 of the Penal Code having been complied with. From the totality of the evidence, the appellant had failed to create any reasonable doubt on the prosecution's case. That being so the prosecution had successfully established at the end of the defence case a case beyond reasonable doubt, whereupon he was found guilty, convicted, and sentenced to death.

[9] With such supposed ironclad evidence, why then did this panel set the appellant free? To appreciate this outcome it is necessary to understand the submission of the appellant, *inter alia*:

i. there was a complete break in the chain of evidence;

ii. there were discrepancies in the number of exhibits;

iii. no reason to kill the deceased even though he wanted to remarry;

iv. his alibi;

v. want of challenge by the prosecution of the appellant's case even though it depended on circumstantial evidence e.g. putting to him that he killed her, transporting the body to the bonfire, that the cigarette butts were his etc; and

vi. the conviction was unsafe.

[10] Let us peruse first the evidence at the stage of the prosecution in particular whether based on the adduced evidence a *prima facie* case was indeed established. We begin by discussing the issue of the complete break in the chain of evidence and that there were discrepancies in the number of exhibits. The strength of the prosecution's case here principally lies on the DNA evidence, the very tool to establish effectively its case. It is all well and good to successfully procure the samples and pieces of evidence on the scene, but they could also be the cause of the

A appellant's acquittal if the investigating officers handling the exhibits were to do a shoddy job when packing, marking, identifying or ensuring their integrity. Dr. Kasinathan Nadesan in *"Forensic Medicine and Science"* at p. 261 authored:

B > As a general guideline, items such as clothing bearing bloodstains or other biological evidence are packaged in paper. Placement in plastic bags would result in bacterial growth and growth of mould and therefore should be avoided. All items, if damp, or wet, should be air-dried (not under the sun) prior to packaging.

C > Small items should be submitted in its entirety. Each item should be separately packed, properly sealed, avoiding contamination due to potential breakage …

[11] For that matter, poor handling of the exhibits by the learned Deputy Public Prosecutor when tendering the exhibits in the D course of the hearing, could undo any good investigation. The main thrust of the defence here is just that and I now proceed to discuss those errors.

[12] Much of the evidence pertaining to the taking of the swabs E came from SP13 and SP23 who were supposed to be hands on with the investigation. SP13 testified that having inspected the van and the surrounding areas he noticed spots of blood at several places and strands of hairs in the van. He then took samples of the blood from different locations. SP23, on 28 March 2003, took F samples of blood from a spanner found at the garage (rekod rayuan 160). At pp. 97 and 399 of the rekod rayuan C1 was marked as the spanner, but regretfully, there is no evidence who marked it and what happened to it, hence creating much doubt about that spanner. On 29 March 2003 at about 2.30pm he took G three swabs from the Proton Waja and five swabs from the van. Unfortunately, that was all that he said about them. He repeated the above mistakes of SP13 and never clarified what happened to those eight swabs. Dr. Kasinathan Nadesan also had occasion to state "when evidence is recovered, there is a requirement that the H evidence or its proximal container be labelled with the name or initials of the recovering officer, date and time of collection, identity, marking etc." We therefore do not know where the eight swabs went or whether they had inadvertently been mingled with the swabs of SP13. Jyotirmoy Adhikary in *DNA Technology in* I *Administration of Justice* at p. 39 had occasion also to author:

> The ability to perform successful DNA analysis on biological evidence recovered from a crime scene depends very much on what kinds of specimens were collected and how were they preserved … If it is not properly collected, its biological activity may be lost. If it is improperly packaged, cross contamination might occur. And if the DNA evidence is not properly preserved, decomposition and deterioration may well occur. Any of these effects seriously affect the outcome on DNA typing.

[13] In *Public Prosecutor v. Richard Chia Kok Hiong* [2007] 3 MLJ 129 under held (1) the court said.

> … Equally important, was the need for stringent measures to be adopted to safeguard the integrity of exhibits when they were collected, handled and stored prior to the items reaching the laboratory.

[14] There was no evidence that the swab from the spanner collected by the investigating officer (SP23) did not contaminate the other swabs and *vice versa*. Having considered the totality of the evidence and guided by the above references, this panel discovered that he had seriously erred when he said nothing about:

i. how they were taken;

ii. the stringent measures taken while lifting the traces of blood in order to ensure their purity;

iii. whether they were preserved after the collection to prevent contamination in order to ensure their integrity remained uncompromised;

iv. whether they were individually packed so that the swabs were not mixed about, which could contaminate other swabs;

v. distinctly identifying the preserved swabs;

vi. stating who packed the exhibits before being sent to the chemist; and

vii. clarifying the chain of possession.

[15] We thus held the view that the "break in the chain of evidence" had not been bridged by the prosecution hence making the results of the above analysis doubtful (*PP v. Syed Muhamad Faysal Syed Ibrahim* [2004] 1 LNS 159).

[16] The above sad state of affairs did not end with the blood swabs. At p. 165 of the rekod rayuan, SP23 said he found two cigarette butts at the bonfire, the very pieces of evidence supposed to pin the appellant down to that place. Like the errors committed earlier, whether by him or SP13, the immediate measures or subsequent actions undertaken surrounding the butts also stopped there. The learned DPP also failed to pursue the matter regarding them. The best he did was to elicit a vague answer from SP23 when he said "barang barang kes di hantar ke Jabatan Kimia pada 3 April 2003 and 7 April 2003". To make matters worse, if only two cigarette butts were recovered from the bonfire site, why did the chemist receive three (pp. 396 and 397 where A5, A7, and C13 contained them)? To compound it, at p. 348 of the rekod rayuan exhs. P11E and P11F established that two more cigarette butts were recovered at the garage and the office. This brings the total to four cigarette butts recovered by the police. Why the fourth cigarette butt was not sent to the Chemist Department for DNA analysis also remained unanswered. With the author of the markings on A5, A7 and C13 a mystery, let alone there is no certainty whether the two cigarette butts examined by the chemist, supposedly carrying the DNA of the appellant, were picked up from the vicinity of the bonfire the prosecution thus failed to establish his presence there beyond reasonable doubt. In a nutshell with a scenario of uncertainty prevailing, the two impugned cigarette butts could have been the two picked up at the garage and the office.

[17] The break in the chain of evidence, and the exhibits compromised the prosecution's case, conceded many a time by the learned DPP, could be summarized in the following manner: there was no evidence to establish who marked or packed all the exhibits sent to the chemist and where they were kept before reaching the latter. Even the correct number of exhibits recovered were in doubt. SP10, the chemist, in the course of his oral evidence and report showed that he received 40 items (see RR 396) whilst SP11 who took the exhs. on 30 August 2003 from the Chemist Department received 42 'sampul berseal' (p. 116). Yet at p. 173 of the rekod rayuan the investigating officer said he received 53 items from the Chemist Department. This is certainly a confused state of affairs.

[18] The last piece of evidence relied upon by the prosecution were the two short messages (SMS) that emanated from the deceased's mobile phone. SP22 said he received two SMS messages from the deceased's mobile phone at 3.25pm and 4.08pm on that date ie, 28 March 2003. The prosecution's stance was that the appellant wanted to create the impression that the deceased was still alive at those hours. By some good fortune, the police recovered the SIM card six days later in the appellant's Mercedes Benz, placed on top of the dashboard covered by some plastic material. The panel found the issue of the SIM card riddled with many questions, *inter alia*:

i. why the necessity for the murderer to meticulously retrieve the SIM card but leaving behind the mobile phone;

ii. prior to the taking of the Mercedes Benz by the appellant from Md Zulkifli (his driver) could anyone else have driven it away. The non-calling of Md Zulkifli did no favours to this unanswered question;

iii. could that someone or even Md Zulkifli have left the SIM card on the vehicle without the appellant's knowledge;

iv. why was the SIM card left carelessly on the dashboard, where anyone could have found it without much effort, after coldly executing the crime followed by the meticulous retrieving of the SIM card from the mobile phone;

v. why did it take the police six days to find the SIM when it was quite easy to find; and

vi. as the card was found six days after the vehicle was impounded, could someone else other than the appellant have placed it on that dash board during that length of time?

[19] SP9 a police officer who received the Mercedes Benz never adduced any evidence of the approximate time when he impounded the vehicle. The appellant stated that he handed the vehicle over to the police at 5.30pm about one hour and twenty-two minutes after the last SMS message was received by SP22. We thus have no idea when the appellant actually took over the vehicle (and admitted by the learned Deputy Public Prosecutor), one of the pieces in the jigsaw puzzle, that could have been

answered promptly if Md Zulkifli had been called as a witness by the prosecution. This unfortunately did not take place as he was offered to the appellant hence the gap in the prosecution's evidence. To exacerbate matters for the prosecution, SP19 admitted that the Mercedes Benz was actually his, with the appellant merely permitted to use it. In a gist between 3.25pm and 4.08pm on 28 March 2003, without any evidence adduced to indicate only the appellant had access to the vehicle, the following people could have access to it, *viz.* Md Zulkifli, SP19 and even the children of the appellant (SP21 and SP22). In brief, as this piece of evidence could be viewed in more than one way, it thus must slant in favour of the appellant (*Abdullah Zawawi b Yusof v. Pendakwa Raya* [1993] 4 CLJ 1; *Gooi Loo Seng v. Public Prosecutor* [1993] 3 CLJ 1). Such an uncertainty brings to mind the remarks of the Court of Appeal of Northern Ireland in *McGreevy v. Director of Public Prosecutor* [1973] 1 WLR 276 when it said:

> Whether at a criminal trial with a jury, in which the case against the accused depends wholly or substantially on circumstantial evidence, it is the duty of the trial judge not only to tell the jury generally that they must be satisfied of the guilt of the accused beyond reasonable doubt, but also to give them a special direction by telling them in express terms that before they can find the accused guilty they must be satisfied not only that the circumstances are consistent with his having committed the crime but also that the facts proved are such as to be inconsistent with any other reasonable conclusion.

[20] With the evidence of the cigarette butts being inadmissible and the issue of the SMS messages unhelpful to the prosecution, it was obvious that the latter was without any solid evidence except for innuendos and suspicion. Abdul Hamid Omar LP in *Pang Chee Meng v. Public Prosecutor* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265; [1992] 1 MLJ 137 at 141 clearly stated that suspicion is not evidence however grave it may be. It was undeniable that the appellant was not sharing the same bedroom with his wife. On the other hand, that relationship was not of a violent or extreme nature that must culminate in the taking of a life. There was no police report filed by the deceased person to indicate the appellant's propensity toward violent acts. SP20 testified that the relationship between family members were good and even added

that the deceased's relationship with the appellant was normal (rekod rayuan 141 and 145). On that premise, unless there was cogent and admissible evidence adduced by the prosecution, this panel was not prepared to accept that merely on the existence of a marriage turned sour, or of wanting to marry again or had indeed behaved rather callously towards the disappearance of the deceased, a *prima facie* case had been established by the prosecution. HT Ong CJ in *Sia Soon Suan v. Public Prosecutor* [1965] 1 LNS 165 succinctly said, "Irrespective of whether the court is otherwise convinced in its mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else …". At this stage, the learned judge should have acquitted and discharged the appellant.

[21] Being oblivious of this panel's eventual stance, and to be on the safe side, learned counsel for the appellant had also beefed up the defence on additional grounds *viz*. his alibi and the want of challenge by the prosecution of the appellant's case. Despite the sufficiency of reasons for allowing the appeal, for completeness, we will discuss the canvassed defences. The learned judge at p. 266 of the rekod rayuan made certain findings regarding the issue of *alibi*, in that he disbelieved that the appellant had gone out to purchase sand when his driver could have performed that job. Certainly to purchase merely a lorry load of sand was insufficient for his construction business. He likewise disbelieved that he went out looking for the deceased at Kg. Talang and Serting. Amongst his reasons was that he could have garnered the assistance of others to look for her instead of doing all that he did. The main objection of the appellant over this finding of facts in relation to the alibi was that, the learned judge misdirected himself by concluding that the appellant had lied. It was the appellant's position that the learned judge should have accepted his evidence, as the assertions were not sufficiently challenged (*Wong Swee Chin v. Public Prosecutor* [1980] 1 LNS 138). We see no error in this statement, as the learned judge should have acquiesced to his evidence, unless they were so incredible or of a romancing character (*Transport Ministry v. Garry* [1973] 1 NZLR 120). If the appellant was complicit as alleged by the prosecution, and the preparations undertaken were coldly and meticulously executed it would equally have been foreseeable and reasonable for him to

A make a pretence of looking out for his wife. The position eventually to be held by the learned judge, which was a misdirection had militated against the interest of the appellant (*Alcontara Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705).

B **[22]** Regardless of the possible error committed by the learned judge, as his view uttered was in relation to the defence of *alibi* and it being uttered only pertained to what happened on 28 March 2003 the appellant was still not out of the woods. The ingredients of the charge read that the murder took place
C beginning from midnight 27 March 2003 until 6.20pm 28 March 2003. He testified that he left the house at 7.30am on 28 March 2003. In a nutshell, and by admission, he was in the house from 11.30pm on 27 March 2003 until 7.30am of 28 March 2003. The Proton Waja from which the deceased alighted and was assaulted,
D was parked right in front of the appellant's house, in which he slept the night before. Therefore, the defence of *alibi* for the appellant could not save him from 11.30pm of 27 March 2003 until 7.30am the next day ie, if the murder took place nearby and between that span of time. The length of time was eight hours
E and essentially, he was near the alleged place of the murder at that time. The defence of *alibi* requires him to be anywhere except the place of the crime and at the time of its commission (*Hussin Sillit v. Public Prosecutor* [1988] 2 CLJ 9; [1988] 1 CLJ (Rep) 128).

F **[23]** Even though the prosecution failed to prove positively that the murder did not take place from 7.30am until 6.20pm on 28 March 2003, and he was not bereft of explanation for that period, with him being nearby the scene for eight hours earlier, this panel believed that his alibi could not stand. To capitalize and
G succeed on this defence it was incumbent upon him to satisfy all the requirements, in that from 11.30pm 27 March 2003 until 6.20pm 28 March 2003, he was somewhere else. Whether he merely did the most natural thing, ie, as it was night he merely slept in his own bed was of no help to him.

H **[24]** We now return to the stage when we earlier concluded that the prosecution in the circumstances of the case had failed to establish a *prima facie* case.

I

[25] With so many loose ends before us, and unconvinced that the available evidence had pointed irresistibly to the appellant's guilt, we did not hesitate to allow the appeal. We set aside the finding of guilt, conviction, and sentence imposed on the appellant by the learned judge (*Chang Kim Siong v. Public Prosecutor* [1967] 1 LNS 18).